

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LAND CASE NO. 20 OF 2019

ESTOMII ORONGAI (Administrator of the Estate of the

Late ORONGAI NAILUGISHO or ORONGAI NAILUGIHO).....PLAINTIFF

VERSUS

- 1. EDWARD MEMIRIEKI1ST DEFENDANT**
- 2. LOIBANGUTI MEMIRIEKI2ND DEFENDANT**
- 3. ASSINA SAID LYULU.....3RD DEFENDANT**
- 4. ALLEN OLOTU4TH DEFENDANT**
- 5. MAPENDO KIWALE5TH DEFENDANT**
- 6. JOHN J. TARIMO6TH DEFENDANT**
- 7. SALIM MAULID7TH DEFENDANT**
- 8. YASSIN ALLY8TH DEFENDANT**
- 9. KASSIM HUSSEIN9TH DEFENDANT**
- 10. RAJABU BAHATI10TH DEFENDANT**
- 11. MWANTIME JUMA11TH DEFENDANT**
- 12. HAFIDHU MKINDI12TH DEFENDANT**
- 13. SAIDI SELEMANI13TH DEFENDANT**
- 14. MWANAHAMISI HASSAN14TH DEFENDANT**
- 15. ZENA SELEMANI15TH DEFENDANT**
- 16. YUSUF SALIM16TH DEFENDANT**
- 17. ABDI JUMA MSUYA17TH DEFENDANT**
- 18. IDRISA JUMA18TH DEFENDANT**
- 19. MOHAMED JUMA19TH DEFENDANT**
- 20. RISHED ALLY20TH DEFENDANT**

21.	SALIM M. MOSHA	21 ST DEFENDANT
22.	ELISIFA MEORI	22 ND DEFENDANT
23.	ADAM KIMARO	23 RD DEFENDANT
24.	DEO ASSEY	24 TH DEFENDANT
25.	ZAKEU DISMAS MATIKA	25 TH DEFENDANT
26.	MENG'ARANA SAMORWON.....	26 TH DEFENDANT
27.	SANGAYO MENG'ARANA.....	27 TH DEFENDANT
28.	SAMORUO MELANYI.....	28 TH DEFENDANT
29.	RISHEDI ALLY.....	29 TH DEFENDANT
30.	RISHEDI ALLY MKANGA.....	30 TH DEFENDANT
31.	MILISHED ALLY MKANGA.....	31 ST DEFENDANT
32.	SALIM MUNGA.....	32 ND DEFENDANT
33.	MEORI MENG'ARANA.....	33 RD DEFENDANT
34.	EMMANUEL H. MSEMOM.....	34 TH DEFENDANT

JUDGMENT

13/10/2021 & 25/01/2022

GWAE, J

The plaintiff herein is an administratrix of the estate of her late father, Orongai Nailugisho or Orongai Nailugihho (deceased). in the course of her administering the deceased's estate she alleges to have discovered that one among the deceased person's properties has been occupied with the above-mentioned defendants. The alleged property (herein to be referred to as the Suitland) measuring 25 acres and is situated at Mtaa wa Mlimani, Muriet Ward, Arusha District in Arusha Region. Its borders are as follows; West-a

road to Mirongo, East- a road, South-Mr. Leng'ida Twaji and North Mr. Njaapaya Nailugisho.

The plaintiff's claim against the defendants is grounded on the fact that, the deceased owned the suit land and therefore it forms part and parcel of the deceased's properties which is subject to distribution to his heirs. The plaintiff thus prays for the judgment and decree be entered against the defendants jointly and severally for the following orders;

1. An order declaring that the suit land form part of the estate of the late Orongai Nailugisho or Orongai Nailugiho currently on the hands of the plaintiff.
2. An order for the defendants to give vacant possession of the suit land.
3. Eviction order be granted against the defendants.
4. Payment of general damages as may be assessed by this court.
5. Permanent injunction restraining the defendants from entering the suit land or dealing with it in any manner whatsoever.
6. Costs of this suit to be borne by the defendants
7. Any other reliefs this Court may deem fit and just to grant.

Upon service of a copy of the plaintiff's 2nd amended plaint, the 1st to 5th defendants under the legal services of the learned counsel Mr. Dismas

Philipo Lume filed their written statement of defence (WSD) where they contended to be the lawful owners of the land in dispute and that, the late Orongai Nailugisho has never occupied the suit land. The 1st and 2nd defendants averred that they inherited part of the suit land from their late father Memirieki Lereko who owned a farm land measuring 8 acres located at Mbuga ya chumvi, terati village within Muriet Ward. The 1st and 2nd defendants further sold part of their apportioned land to the 3rd and 4th defendants. The 4th defendant averred that, he lawfully acquired piece of land measuring 2.5 acres, portioned it and obtained two certificates of Titles. The 5th defendant on the other hand stated that he lawfully purchased the land in the year 2004 from the heirs of the late Memirieki Lereko and he has been in occupation of the same uninterruptedly since then. Together with their WSD the defendants attached copies of sale agreements of the 3rd, 4th and 5th and two copies of the Certificate of Titles.

The 6th to 23rd defendants also through their learned counsel Mr. Mbise filed an amended written statement of defence to the 2nd amended plaint where they utterly maintained that they are not trespassers to the suit land and that the suit land is not part of the deceased's estate as stated in the plaint on reason that in application No. 40 of 2015 before the district Land

and Housing tribunal of Arusha the plaintiff filed an application suing some of the defendants and she claimed that the suit land was given to her and her sisters by their late father before his demise. The defendants further disputed the borders which are stated by the plaintiff in her plaint as they do not match with borders of pieces of land occupied by them. More so, the defendants contended that the plaintiff has failed to establish as to when the defendants trespassed into the disputed land. It was further stated that the disputed land was the lawful property of the late Meng'arana Samorwon and his sons who subsequently sold the same to the 6th -23rd defendants. The defendants thus prayed for the plaintiff's suit to be dismissed with costs.

The 24th defendant also filed his written statement of defence and strongly disputed the plaintiff's claims stating that he lawfully purchased the suit land from the 4th defendant on 12th July 2019 and that he has been peacefully occupying the disputed land. The defendant further stated that he had already processed transfer of ownership from the 4th defendant into his ownership and he has already acquired a title deed to that effect.

The 25th defendant through his advocate Mr. Jeremiah Mjema filed his Written Statement of Defence and stated that the 25th defendant is deceased and that his estate is being administered by one Stephan Zakeu Matika. It is

further stated that the 25th defendant acquired a piece of land measuring 6 acres from one Fatuma Mohamed and transferred the same *inter vivos* to his son Morgans Zakeu Matika in the year 2005. A copy of an agreement dated August 1988 and 14th March 1989 and a title deed were attached to the WSD.

Nevertheless the 26th to 34 defendants are found to have not filed their written statement of defence nor did they appear to defend their case even after a substituted-service through Mwananchi newspaper dated 17th September 2020. Hence, the matter proceeded in their absence.

Throughout the trial of this suit, the plaintiff was being represented by Mr. Macmillan Makawia assisted by Mr. Alpha Ngondya, both the learned advocates whilst the 1st to 5th & 24th defendants were being represented advocate Mr. Dismas Lume, the 6th to 23rd defendants were similarly represented by the learned counsel Mr. Mbise and the 25th defendant was equally being enjoying legal services of Mr. Jeremiah Mjema (adv) from Jeremiah S. Mjema, Advocate, Voice Attorney.

As required by the provisions of Order VIII D Rule 40 (1) of Civil Procedure Code, Chapter 33, Revised Edition, 2019 (CPC), that, issues for determination should be framed immediately before commencement of a

trial, the following issues were framed after the requisite consultation with the parties' advocates;

1. Whether the trial court has jurisdiction to determine the suit.
2. Whether the suit land, plots allegedly occupied by the defendants, forms part of the estate of the late Orongai Nailugisho or Orongai Nailugiho.
3. Whether the defendants are lawful owners of plots located within the land in dispute.
4. What reliefs are the parties entitled.

In her endeavors to establish the case, the plaintiff summoned two witnesses namely; the plaintiff who testified as PW1 and one Lashi Tiophilo Manyaa PW2. PW1 while testifying tendered three documentary exhibits, these are; Death Certificate of her late father issued in the year 2014, Letters of administration dated 13th November 2014 and a Lease agreement dated 22nd April 1972.

In her oral testimony, PW1 testified that she is an administratrix of the estate of her late father Orongai Nailugisho who passed away in 1972. Copy of the death certificate was tendered in court, admitted and marked as exhibit P1. That, following the demise of her father, she was appointed an

administratrix of the estate of her late father. She was appointed by the Arusha Urban Primary court in the year 2014 and was subsequently issued with letters of administration which was admitted in court and marked as exhibit PE2. PW1 went further to state that as an administratrix of the estate of the deceased has instituted this dispute suing the defendants as they have trespassed to a land that was previously owned by the deceased. The said land is located at Mlimani Street Muriet Ward and it measures 25 acres, the boundaries are as intimated herein.

In proving that, the land in dispute belonged and was in possession to her late father, PW1 stated that, there are witnesses who were allocated pieces of land by local authority together with the deceased. She added that the deceased was using the disputed land for his personal use and he was also leasing to other people. PW1 tendered a lease agreement dated 22/04/1972 between the deceased and one George Abraham, the same was admitted in court and marked as PE3. In concluding her testimony, the plaintiff prayed for a declaration that the suit land is the lawful property of her late father, an order for eviction against the defendants, payment of damages and costs of the suit to be borne by the defendants.

When cross examined by defence counsel, PW1 stated that the disputed land was allocated to her late father by a chief known by the name of Zephania and that the deceased was survived by daughters and sons. On further cross examination, PW1 stated that the dispute arose in the year 2009 and that she had instituted this suit in the year 2019. She also stated that, the last time they were in possession of the land in dispute is the year 1999 following heavy rains ("El Nino") and that she does not know exactly when the defendants trespassed the land in dispute save for the 1st and 2nd defendants whom she alleged to have trespassed in the year 1999. As to the lease agreement PW1 stated that the same does not specify the location of the land in dispute neither does it show its size.

PW2's testimony is to the effect that, she was a neighbor to the deceased at Muriet who had a farm. PW2 went on telling the court that, the deceased person was allocated 25 acres by chief Zephania Sumulei. On cross examination, PW2 said that she was also allocated 25 acres at Muriet area on which she cultivated for only three years that is from 1959 to 1961 before she got separated with her husband. Since then, she has not gone to the disputed land and thus she does not know the current occupiers of the suit land.

After close of the plaintiffs' case defendants were accordingly afforded an opportunity to enter their respective defence. The defendants' evidence was intended to establish their ownership of different pieces of land in the disputed land. In summary their defence is as follows;

DW1, Edward Memirieki (1st defendant) testified that he acquired about 1 ½ acres by inheriting from his late father Memirieki. He was given the same in the year 1993 by his elder brother Solomon Godfrey as per the directives of his late father as his father had passed away in the year 1966 when he was 16 years old. He went on testifying that, he had been using the land for agricultural activities and grazing, however, currently the said land is owned by one Assina Said (3rd defendant) who bought it together with another piece of land belonging to his brother Lembrick making a total of 2 ½ acres. The said parcels of land were sold on the 13th August 2004 at the price of Tshs. 7,800,000/=. Moreover, DW1 stated that he could not tell as to how his late father came into possession of the said land but all the same, he maintained that he is not a trespasser.

DW2, Loibanguti Memirieki (2nd defendant) testified that his late father occupied only eight acres in the land in dispute and as for him he only inherited 1¼ acres from his late fathers' estate. However, he sold the same

to one Asina Said (3rd Defendant) in the year 2004 it was his argument that his late father had never possessed 25 acres and that, the plaintiff has never possessed the said 8 acres. on cross examination DW2 stated that he does not know as to how his late father acquired the land in dispute.

DW3, Assina Said, testified as a buyer and owner of parts of the land in the disputed land measuring 2½ acres which were sold to her by DW1 and DW2. To substantiate her ownership of the said acres, she produced a sale agreement which was received and marked as DE1. She further testified that that, she had already built a dwelling house and a mosque. On cross examination, DW3 stated that at the time she was buying the land DW1 and DW2 (the sellers) told her that they inherited the said land from their late father.

Another defence witness was Leska Lebotoa who appeared as DW4, principally, his evidence established his neighborhood with the late Memirieki whom he claims to own about 8 acres. According to him, the late Memirieki started using his farm from 1960 till 1993 when he passed away. His farm and that of the late Memirieki were nearby as his farm was on the western side, nevertheless, DW4 did not know as to how the late Memirieki acquired the said land.

DW5 Godfrey Memiriki, he testified as a third born to the late Memiriki. His testimony is such that his late father owned a land measuring 8 acres which is now part of the land in dispute. Being the heir of his late father's estate, he inherited one acre, however he sold the same to one Allen Philemon Olotu (4th defendant) in the year 2005. However, in the sale agreement his name does not appear as the seller on reason that the same was sold by his young brother one Mr. Loibanguti who sold it on his behalf as he was on safari.

His evidence was corroborated by that of DW6, Allen Olotu (4th defendant) who he testified to have bought a piece of land measuring 2½ acres from Loibanguti and Samwel in the year 2005 and later on (2019) he sold it to one Lucas Mtenga. He then tendered the sale agreement (DE2) and sought one Lucas Mtenga to be declared the lawful owner of the land. His testimony was supported by that of DW8, Lucas Mtenga (24th defendant) who tendered two sale agreements and certificate of titles, collectively received as DE4. He also adduced that ever since he bought the said land there has never been any dispute.

Another piece of evidence by defence is that of Mapendo Kiwale who is sued as the 5th defendant (DW7). DW7 testified that on 17/06/2004 he

bought a piece of land measuring 115 x 94 paces from Solomoni and William Memiriki and that, since then he had not experienced any interruption. The witness further tendered a sale agreement which was received as exhibit DE3 he later on proceeded for a title deed but could not tender it as it is withheld by NMB Bank.

It is further the defence by one Stephano Zakiyu Matika (DW9) to the effect that, he is the son and an administrator of the 25th defendant who is now deceased. he went further to state that, his late father possessed five (5) acres in the disputed land and the same were brought from one Fatuma Mohamed in the year 1998. Before his death he gave the said land to his son Morgan Zakiyu who in this case testified as DW10.

Supporting the testimony adduced by DW9, DW10 stated to the effect that, he is the lawful owner of a land measuring 6 acres which he was given by his late father, Zakeu Dismas in the year 2000. He also tendered a CT and the same was admitted and marked as DE6. He thus prayed for the dismissal of this suit as he is the lawful owner of the land measuring 6 acres and that ever since he has been in occupation of that land there has never been any dispute.

Likewise, one Rishedy Ally who is sued as the 20th defendant who appeared in the court for testimonial purposed as DW11 gave his evidence to the effect that, he acquired a piece of land in the disputed land measuring 25 x 56 paces in the year 2003 and 6 x 56 paces in the year 2004. He bought the same from Mzee Mengarana (26th defendant) who is now deceased and his son Likindaraki.

DW11 went on testifying that at different times he sold his part of land to the following people seven (7) people; Rajabu Bahati, 10th defendant (5 x10 paces), Hafidhu Mkundi, 12th defendant (12x15 paces), Zena Selemani, 15th defendant (18x12 paces), Kassim Hussein, 9th defendant (5x125 paces), Abdi Msuya, 17th defendant (10x8 paces), Idrisa Juma, 18th defendant (10x15 paces) and Yassine Ally, 8th defendant (10x7.5 paces). To substantiate the said sales, DW11 tendered 9 sale agreements admitted and collectively marked DE7.

The 7th defendant, Salim Munga (DW12) also entered his defence. He seriously contended to be the owner of the piece of land measuring 30 x 60 after he purchased the same from Mzee Meng'anara (26th defendant) and his family. Authenticating his evidence, he tendered the sale agreement dated 5th April 2002 and the same was admitted and marked as DE8.

Another defence witness who appeared before the court to counter the plaintiff's claims was one John Joseph Tarimo, 6th defendant (DW13). DW13 testified that, he bought the land from the 26th defendant one Meng'anara. He bought the same together with two other persons that is the 21st and 23rd defendant. He added that one Emmanuel Msemo (34th defendant) Loserian Mang'arana also purchased a parcel of land. DW 13 also able to tender three sale agreements where the 6th, 21st and 23rd defendants are referred as buyers, the same was admitted and marked as DE9.

DW13 went on to state that, the plaintiff's evidence is contradictory as on one hand she claims to be the owner of the land but on the other hand she claims to be the administrator of the estate of her late father. He added that. he bought another piece of land from Sangayo Meng'anara measuring 62 x 30 however the original sale agreement got lost.

The last witness to testify on behalf of the defendants in this suit is Mesiako Meng'anara Samuruo (DW14) who testified to be the son of one the late Meng'anara whom he told the court that the said Meng'anara was in possession of six (6) acres in the disputed land which he acquired in the year 1961 and that at the time of clearing the farm he was present and he also participated in the farm's clearance.

DW14's evidence also to the effect that before the demise of his late father, the deceased distributed his land to his children, part of the land, part of the six acres was sold Tarmo (6th defendant) and that there has never been any dispute in the land nor does he recognize the plaintiff.

After the closure of the defence case, the parties were given leave to file their closing submissions which will be considered while determining the framed issues but also locus in quo was visited by the court and the parties as well as their respective advocates and the following observations were made;

1. That, the land in dispute is measuring about 25 acres
2. That, all defendants' parcels of land are located at disputed land
3. That, there is a mosque within the suit land located at nearby two residential houses owned by the 3rd defendant, Assina Said
4. That, most of defendants have their residential houses located at suit land Eastern side (6th – 23rd defendant) save 1st, 2nd and 4th defendants
5. That, there are people who have developed their pieces of land but they have not been joined to this case (Two persons)
6. That, there is unoccupied parcels of land owned by the 25th defendant (DW10) 6th and 5th defendant which are not developed i.e that is no building that has been erected thereon.

It is now time for this court to determine the framed issues which were framed by the court as intimated above.

"In the first issue whether the trial court has jurisdiction to determine the suit".

The questioned jurisdiction of this court is on limitation of time of the plaintiff's claim on recovery of land. I am alive of the time limit provided by the law in a suit regarding recovery of land being twelve (12) years as stipulated under 1st schedule part 1, item 22 of the Law of Limitation Act, Cap 89 Revised Edition, 2019 ("Act"). In our suit, according to the plaintiff, the deceased passed away on the 2nd July 1972 as per PE1 but the death certificate was vividly issued on the 22nd August 2014 whereas it is evidently established that, the plaintiff was granted letters of administration of the estate of her late father on the 13th November 2014 (PE2). That means the grant of letters of administration of the estate of the deceased was after more than **forty-two (42)** years since the deceased's demise.

That being the position, I am now bound to determine whether the plaintiff's suit is time barred or if the same is rescued by the provisions of the Act, As rightly argued by the counsel for the 6th-23rd defendants and 25th defendant that, applicable provisions of the law are; section 9 (1) and 35 of

the Act applicable. For easy of determination of the 1st issue, I find it apposite to herein under reproduce provisions of section 9 and section 35 of the Act;

"9 (1) Where a person institutes a suit to recover land of a deceased person, whether under a will or intestacy and the deceased person was, on the date of his death, in possession of the land and was the last person entitled to the land to be in possession of the land, the right of action shall be deemed to have accrued on the date of death.

(2) Where the person who institutes a suit to recover land, or some person through whom he claims, has been in possession of and has, while entitled to the land, been dispossessed or has discontinued his possession, the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance.

(3) Where a person institutes a suit to recover land, being an estate or interest in possession and assured otherwise than by will, to him, or to some person from whom he claims, by a person who, at the date when the assurance took effect, was in possession of the land, and no person has been in possession of the land by virtue of the assurance, the right of action shall be deemed to have accrued on the date when the assurance took effect.

"35. For the purposes of the provisions of this Act relating to suits for the recovery of land, an administrator of the estate of a deceased person shall be taken to claim as if there had been no interval of time between the death of the deceased

person and the grant of the letters of administration or, as the case may be, of the probate”.

Section 9 (1) of the Act was construed by this court (**Msumi, J**) in **Yusuph Same and another vs. Hadija Yusuph** (1996) TLR 347 where it was held;

“Applying these provisions to the present case respondent’s right of action accrued from 14 January 1979 when the deceased died. The computation of this period still begins from that date despite the fact that the respondent was granted letters of administration on 25th February 1992, that is about 12 years after the death of the deceased.”

Examining, the wordings of the provisions of the statute above, judicial precedent as well as written closing submission of the defence’ counsel. I am of the firm view that, a right to institute a suit on recovery of land which belonged or was possessed by a deceased person who was the last person entitled thereto (the deceased person was owner of the land sought to be recovered), accrues or reckons at the death of the deceased notwithstanding the time of the grant of letter of administration or probate as the case may be.

Since it is clear that the deceased died on the 2nd July 1972 and it is evidently clear that, the plaintiff initially lodged the suit in the District Land and Housing Tribunal 2015 vide Land Application No. 40 of 2015, that means

the plaintiff's suit is extremely time barred, subject to an order dismissing it pursuant to section 3 (1) of the Act in case the alleged trespass happened since 1972 or immediately thereafter.

However, in the circumstance of this dispute, I am of the different view, simply because of the parties' pleadings, the plaintiff's evidence as well as that of defense which is to the effect that there was no trespass since 1972 till 1999. Unless the defendants were alleging to be in possession of the suit land since 1972, this suit land would be time barred as opposed to the present case where the plaintiff is found seriously asserting that they had been continuously using the suit land from the date of the deceased's death till 1999, during the El Nino rains when the deceased's family abstained from using it. It follows that, the plaintiff's suit is generally time barred due to the fact an action to recover land shall not accrue unless the land to be recovered is in possession of some person in whose favour the period of limitation can run (adverse possession) as stipulated under section 33 of the Act (supra).

Nonetheless, it is vividly clear that the plaintiff, when cross examined by the defence counsel especially, Mr. Lume and Mr. Mjema, admitted that the 1st, 2nd and 25th defendant had trespassed since 1999 as well as the

testimonies of DW1 and DW2 who subsequently sold their parcels of the then farm to the 3rd defendant. Equally, the testimonies of DW9 and DW10 who told their late father (25th defendant) whom they testified to have bought 5-6 acres from one Fatuma Mohamed at the tune of Tshs. 80,000,000/= in 1988, the said acres now in possession of DW10. That being the case, the dispute between the 1st, 2nd, 3rd and 25th defendant is therefore time barred as 16 years had already lapsed since she became aware of the trespass, if so, unlike to other defendants who have testified to have bought their respective pieces of land mostly in the 2004. I am saying so simply because the time started to run against the plaintiff since 1999 till 2015 when she bonafidely instituted and prosecuted her Application No. 40 of 2015 before DLHT and not when this dispute was filed to the court. Hence, the date to be considered is 2015 and not 2019 and this as per section 21 of the of the Law of Limitation Act (Supra).

Coming to the 2nd issue, **whether the suit land form part of the estate pf the late Orongai Nailugisho (deceased).**

I am not unsound of the cardinal principle that, a burden of proof is upon a person who desires a court to give judgment on his or her behalf (Se Section 3 & 110 (1) and (2) of the Evidence Act, Cap 6, Revised Edition,

2019 and **Godfrey Sayi v. Anna Siame as Legal Representative of the late Mary Mndolwa**, Civil Appeal No. 114 of 2012 (unreported-CAT)). From outset, I am not persuaded if the plaintiff had been able to establish to the required standard that the land in dispute was and still the estate of her late father at the before his demise and if in affirmative if the same was not sold subsequent to the deceased's death. I would wish to subscribe my holding in **The Manager, NBC, Tarime v Enock M. Chacha** (1993) TLR 228 where was judicially stated;

"Corollary to the above, Bahati J, has said this in *Felix M Shirima v. Mohamed Farahani and Another* (2) It is a cardinal principal of law that in civil cases there must be proof on the balance of the probabilities. In this case, it cannot be said that the scanty evidence adduced in this Court proves in any way what is alleged in the plaint. There must be proof of the case on the standard by law which is on the balance of the probabilities even when a case proceeds ex-parte like in this case"

In our instant suit, I am of the view that, the plaintiff's evidence is very scanty to convince the court to hold in plaintiff's favour. I am of that holding simply because the plaintiff, when cross examined as to whether the deceased had other daughters and sons who are alive, she positively replied that the deceased is survived by other heirs who are still alive nevertheless

she did not call any witness from her family members except her summoning of PW2, a mere neighbor who testified to have vacated the area located at near the suit land since 1961 and the fact that she did not know any alleged trespasser nor does she know of any developments made thereat. Therefore, it is my considered view that the testimony of the plaintiff ought to have been corroborated by any other family member (s) whose evidence would materially support that of PW1. In the omission to summon any other family members including Augustino Orongoi leaves a lot to be desired. I have taken necessary recognizance that I am not holding so simply because the plaintiff is a female heir since our law and international law recognize inheritance by women as well as recognition of equality before the law by our Constitution, 1977 but in the circumstances of this case, in my decided opinion, there ought to be other pieces of evidence from reliable witnesses particularly from the deceased's family. This position of the law was judicially stressed by the court in **Hemedi Saidi vs. Mohamedi Mbilu** (1984) TLR 113 where it was stated among other thing that:

"In measuring the weight of evidence, it is not the number of witnesses that counts most but the quality of the evidence; where, for undisclosed reasons, a party fails to call a material witness on his side, the court is

entitled to draw an inference that if the witnesses were called, they would have given evidence contrary to the party's interests".

Considering the fact that, most of parcels of the suit land save to 6 acres owned by DW10 are developed, they are erected houses, mosque and other buildings. The plaintiff had therefore a duty to sufficiently prove that the suit land really belonged to her late father and if so, that, the same had not been disposed of by his descendants.

The plaintiff's failure to call other deceased's heirs/beneficiaries who would not only support the plaintiff's case as interested persons to the suit land but also, they would assist the court in occasioning justice in this particular case. The plaintiff's omission to call such material witnesses leaves a lot to be desired as opposed to the defendants for instance those who contended to have lawfully sold their pieces of land from the descendants of Meng'anara Samuruo and that of Memireki (DW14, DW1, DW2, DW4 and DW5).

Similarly, I have scrutinized PE3, a lease agreement between the deceased and one George Ibrahim and noted that the lease agreement is not indicative as to the location of a parcel of land leased to the said George. This piece of evidence carries no weight as to the ownership of the suit land

by the deceased. Even if the deceased had such possession on the suit land, one would pose a question, whether the deceased's ownership of the leased portion of the land to the said George guarantees the same to be under the deceased person's family till 1999, the answer is not in affirmative. The 2nd issue is therefore negatively answered.

As to the 3rd issue, **whether the defendants are lawful owners of the plots located within the land in dispute.**

Taking into Consideration of the sale agreements that were tendered by some of defendants to wit, (DE1, DE2, DE3, DE4, DE5, DE7 comprised of 9 sales agreement, DE8, DE9 in respect of 3 sale agreements and another agreement for identification purpose) making a total of 18 sale agreements in respect of 3rd defendant, 4th defendant, 5th defendant, 25th defendant, 9th defendant, 18th defendant, 12th defendant, 15th defendant, 20th defendant-2 contracts, 17th defendant, Yasin Ally (not sued), 21st defendant, 23rd defendant, 6th defendant respectively. There are also three (3) right of occupancies-CTs these are in respect of Morgan Z. Matika (DW10) and two certificates of title (DE4), the properties of one Lucas Mtenga (not sued as well).

I have taken into account of the oral evidence adduced by the defence witnesses as well as documentary evidence, I am fully satisfied that, the 1st to the 25th defendants have sufficiently established their ownership over their respective pieces of land in the disputed land as opposed to the plaintiff who have not only failed to prove her ownership against the 1st to 25th defendant but also to those who have not turned up for testimonial purposes. I am of that view simply because the plaintiff had a duty to prove the suit against those who neglected or refused to enter their appearance at the required standard notwithstanding their absence as the burden of proof is still there to be discharged by her as was rightly emphasized in the case of **Manager, NBC, Tarime v. Enock m. Chacha** (1993) TLR 228 where it was judicially demonstrated that;

"It is a cardinal principal of law that in civil cases there must be proof on the balance of the probabilities. In this case, it cannot be said that the scanty evidence adduced in this Court proves in any way what is alleged in the plaint. There must be proof of the case on the standard by law which is on the balance of the probabilities even when a case proceeds ex-parte like in this case. . . ."

In our instant suit, the plaintiff's evidence is considered as incredible for the reasons demonstrated in the 1st issue herein. Thus, the defendants

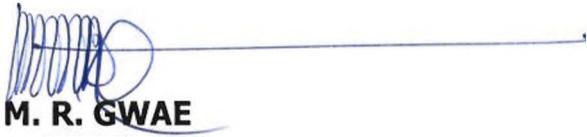
are found to be lawful owners of their respective parcels of land in the land in question.

On the last issue on reliefs that the parties are entitled.

It is clear that the ones who have proved to be owners of the suit land are eligible for being declared lawful owners of the same. Therefore, the plaintiff and her agents or any other person working under her instructions are restrained from interfering with the defendants' rights of quiet possession and use of their pieces of land.

Basing on the foregoing reasons, the plaintiff's suit is entirely dismissed for want of proof. The defendants are declared lawful owners of the disputed parcels of land located in the suit land measuring about twenty (25) acres and the plaintiff and her agents or any other person working on her instructions are permanently restrained from making any interference with the use or possession or occupation by the defendants. The plaintiff shall bear the costs of this suit.

It is so ordered.


M. R. GWAE
JUDGE
25/01/2022

Court: Right of Appeal to the Court of Appeal of Tanzania fully explained



M. R. GWAE
JUDGE
25/01/2022

